

DOCKET FILE COPY ORIGINAL

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

SEP - 8 1997

In the Matter of

Federal-State Joint Board on  
Universal Service

)  
)  
)  
)

CC Docket No. 96-45

**ERRATUM**


Attached hereto is a corrected version of the Petition For Clarafication and Exception Or Waiver submitted September 2, 1997, by the Association of America's Public Television Stations ("APTS") and the Public Broadcasting Service ("PBS") in the above-referenced proceeding. The only differences between the attached version and that submitted on September 2 are: correction of the name of petitioner PBS on the cover page and signature page; amendment of footnote 3; addition of a citation in footnote 15; deletion of the last sentence of the penultimate paragraph on page 3; and deletion of a redundant phrase on page 11.

Respectfully submitted,

PUBLIC BROADCASTING SERVICE

THE ASSOCIATION OF AMERICA'S  
PUBLIC TELEVISION STATIONS

By:

  
Jonathan D. Blake  
Alane C. Weixel

Covington & Burling  
1201 Pennsylvania Ave., N.W.  
Post Office Box 7566  
Washington, D.C. 20044-7566  
(202) 662-6000

Their Attorneys

September 3, 1997

No. of Copies rec'd  
List ABOVE

022

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Federal-State Joint Board on	)	CC Docket No. 96-45
Universal Service	)	

**PETITION FOR CLARIFICATION AND EXCEPTION OR WAIVER**

PUBLIC BROADCASTING  
SERVICE

THE ASSOCIATION OF AMERICA'S  
PUBLIC TELEVISION STATIONS

Paula A. Jameson  
Senior Vice President, General Counsel  
and Secretary

Ann Zedd  
Assistant General Counsel

1320 Braddock Place  
Alexandria, VA 22314-1698  
(703) 739-5056

Marilyn Mohrman-Gillis  
General Counsel  
Lonna Thompson  
Director, Legal Affairs  
1350 Connecticut Avenue, NW  
Suite 200  
Washington, D.C. 20006  
(202) 887-1700

Jonathan D. Blake  
Alane C. Weixel

Covington & Burling  
1201 Pennsylvania Avenue, NW  
P.O. Box 7566  
Washington, D.C. 20044-7566  
(202) 662-6000

Their Attorneys

September 3, 1997

**TABLE OF CONTENTS**

**Summary** ..... 2

I. Background ..... 3

    A. Public Television and PBS Lease Arrangments ..... 3

    B. The Communications Act ..... 4

II. Request for Clarification ..... 5

III. Request for Exception or Waiver ..... 7

IV. Conclusion ..... 12

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Federal-State Joint Board on	)	CC Docket No. 96-45
Universal Service	)	

**PETITION FOR CLARIFICATION AND EXCEPTION OR WAIVER**

The Association of America's Public Television Stations ("APTS") and the Public Broadcasting Service ("PBS") are nonprofit organizations whose members are the licensees of nearly all of the nation's 351 public television stations. The fundamental mission of public television and PBS is to provide educational programming to all of the homes and classrooms in the United States. Indeed, many of the public television licensees are educational organizations, including public school districts, colleges and universities. To distribute educational programming throughout the country, public television utilizes many different technologies, such as Instructional Fixed Television Service ("ITFS"), the vertical blanking interval of their broadcast channel, and satellite capacity.

In the Telecommunications Act of 1996 ("1996 Act"), Congress recognized the importance of telecommunications services to our educational system. The 1996 Act provides that, for the first time, schools and libraries shall be direct recipients of universal service support. These provisions are designed to "help open new worlds of knowledge, learning and education to all Americans -- rich and poor, rural and urban."<sup>1/</sup> Congress

---

<sup>1/</sup> Joint Explanatory Statement, H.R. Rep. No. 458, 104th Cong., 2d Sess. at 132-33 (1996).

directed the Commission to "establish competitively neutral rules to enhance, to the extent technically feasible and economically reasonable, access to advanced telecommunications and information services to all public and non-profit elementary and secondary school classrooms . . . and libraries."<sup>2/</sup>

### **Summary**

Last week APTS and PBS learned that Commission staff has interpreted the universal service rules to impose new financial burdens on public television stations. Staff has opined that any revenues derived by public television through leasing excess capacity on the vertical blanking interval of broadcast channels, or on ITFS channels or on satellite transponders will be subject to universal service contributions. In other words, the staff's interpretation would take funds away from the very entities that are involved in furthering the educational goals of universal service. This clearly is not the intent of Congress. Accordingly, APTS and PBS request clarification regarding the application of the Commission's universal service rules to public broadcast stations and ITFS licensees. If the Commission concludes that the language of the universal service rules extends the requirement for contributions to the universal fund to revenues derived from lease arrangements, APTS and PBS request an exception or waiver of this requirement.

---

<sup>2/</sup> 47 U.S.C. § 254(h)(2)(A).

## **I. Background**

### **A. Public Television and PBS Lease Arrangements**

During the last several years, Congress has placed increasing pressure on public television stations to reduce their reliance on federal funding. Accordingly, these stations have sought innovative ways to raise funds to support their educational mission. One funding source currently used by many public television stations is to lease excess capacity on the vertical blanking interval ("VBI") of the broadcast channel.

PBS facilitates these leasing arrangements through a subsidiary -- PBS National Datacast ("Datacast") -- that provides nationwide data broadcasting services. The public television stations provide some of their excess VBI capacity to Datacast. Datacast then leases this capacity for a fee to electronic information services and programming providers, which offer services, such as programming guides to television viewers and educational content. In addition to transmitting their own program information, Datacast's lessees also transmit some educational programming created by PBS.<sup>3/</sup> A portion of the revenues Datacast receives are returned directly to the public broadcast stations.

PBS has also raised revenues for its programming development by leasing excess capacity on its satellite transponders. PBS primarily uses the satellite transponder capacity to transmit public television programming to public stations around the country.

---

<sup>3/</sup> For example, StarSight Telecast, Inc. provides PBS interactive educational services, such as "Parent Tips" which are revealed as part of the PBS television program descriptions. WavePhore, Inc. includes portions of PBS Online content, including educational information, as part of its information services offering.

Any capacity that is not needed for public television uses is leased at reduced rates to national educational satellite programmers to distribute educational programming. If excess capacity remains after these public television and educational programming needs are met, PBS has in the past entered into short-term lease arrangements with commercial programming providers.<sup>4/</sup> The revenues generated through leasing capacity on the PBS transponders are used to reduce the annual fees paid to PBS by its member public television stations.

Finally, many of the public television stations are also ITFS licensees. The ITFS capacity is used by educational entities to provide instructional programming to schools and the community. Many ITFS licensees also lease excess capacity to commercial wireless cable providers. For example, WLRN licensee of the Dade County Public Schools operates a video on demand service on its 20-channel ITFS system, which serves 18,000 teachers and 320,000 students in the Miami area.

#### **B. The Communications Act**

The Communications Act requires that "[e]very telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis" to universal service funding mechanisms.<sup>5/</sup> The Commission has properly interpreted this provision as applying only to telecommunications common carriers. There is no question that the lease arrangements addressed above are not

---

<sup>4/</sup> The PBS lease arrangements with commercial providers have always been short term so that the excess capacity can be promptly reallocated to public television or educational uses as the need arises.

<sup>5/</sup> 47 U.S.C. § 254(d).

provided on a common carrier basis. Clearly, therefore, no mandatory contribution is required from public television stations or from PBS.

The Communications Act also permits the Commission to require that "other provider[s] of telecommunications services . . . be required to contribute to . . . universal service if the public interest so requires."<sup>6/</sup> The Commission used this discretionary authority to require that private providers that offer interstate telecommunications services for a fee contribute to the universal service fund.<sup>7/</sup> This provision, however, cannot reasonably be read to encompass the types of lease arrangements addressed above. Accordingly, APTS and PBS seek clarification to this effect.

## **II. Request for Clarification**

The Act permits the Commission to utilize its discretionary authority to require "other provider[s] of telecommunications services" to contribute to universal service only if "the public interest so requires." In the Commission's Report and Order adopting its universal service rules, there is no finding by the Commission that the public interest is served by requiring public television stations or PBS to contribute to universal service funding. Indeed, it does not further the goals of universal access to educational opportunities by reducing the funds of the very entities trying to implement these universal service educational ideals. Accordingly, it is unlikely that, in adopting Section

---

<sup>6/</sup> 47 U.S.C. § 254(d).

<sup>7/</sup> Federal-State Joint Board on Universal Service, Report and Order, CC Docket 96-45 (rel. May 8, 1996), ¶ 795.

54.703 of its rules, the Commission intended that it encompass the ITFS, VBI and satellite lease arrangements of public television stations and PBS. For this reason, APTS and PBS seek clarification that these lease arrangements do not fall within the universal service contribution requirement.

The universal service provisions adopted by Congress require that the Commission implement universal service contributions in an equitable and nondiscriminatory manner and on a competitively neutral basis.<sup>8/</sup> Requiring public television stations, ITFS licensees, and PBS to contribute to universal service funding violates these principles.

The Commission's universal service rules limit the contribution obligations for satellite and video services. The Commission exempted entirely commercial entities providing open video systems ("OVS"), cable leased access, and direct broadcast satellite ("DBS") services. Thus, to the extent that OVS, cable television systems, or DBS providers lease excess capacity to other video or data programming providers, revenues derived from those leases are exempt from contribution obligations. Public television stations are most similarly situated to OVS, cable and DBS providers in that they primarily deliver a video programming service and lease excess capacity to other video and data providers. There is no reasonable basis for exempting these commercial entities from universal service contributions while requiring nonprofit public television stations and PBS to contribute based on revenues derived from the same type of excess capacity lease arrangements. Imposing such a requirement would be discriminatory and would

---

<sup>8/</sup> 47 U.S.C. § 254(b)(4).

violate the competitive neutrality requirement of the Act. Accordingly, the Commission should promptly clarify that Section 54.703 does not impose contribution obligations on the lease arrangements entered into by PBS and public television stations.

### **III. Request for Exception or Waiver**

To the extent that the Commission concludes that Section 54.703 does encompass the types of excess capacity lease arrangements entered into by PBS and public television stations, APTS and PBS seek an exception or waiver of this rule. The Commission may grant a waiver if good cause is shown.<sup>9/</sup> The D.C. Circuit requires that a party seeking a waiver demonstrate that the rule is unjust as applied to the party given the unique circumstances of the situation.<sup>10/</sup> A waiver is appropriate "if special circumstances warrant a deviation from the general rule and such deviation will better serve the public interest than strict adherence to the general rule."<sup>11/</sup>

If Section 74.703 requires that public television stations and PBS contribute to universal service funding based on their excess capacity lease arrangements, a waiver is clearly warranted. First, as described above, application of this rule would be unjust. The Commission has exempted commercial entities that lease excess capacity on a much larger scale to video and data programming providers. To impose contribution

---

<sup>9/</sup> Section 1.3 of the Commission's rules, 47 C.F.R. § 1.3.

<sup>10/</sup> See Northeast Cellular Tel. Co. v. FCC, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (citing WAIT Radio v. FCC, 418 F.2d 1153 (D.C. Cir. 1969)), cert. denied, 409 U.S. 1027 (1972).

<sup>11/</sup> Implementation of the Telecommunications Act of 1996, Report and Order, CC Docket No. 96-193 (released May 20, 1997).

obligations on small, nonprofit entities providing precisely the same service would be discriminatory and unjust.

Second, the public interest clearly warrants a waiver. The Commission and Congress have a long-standing history of exempting public broadcasting stations from financial obligations imposed on other licensees. For example, public television stations are exempt from paying application fees and regulatory fees.<sup>12/</sup> Further, both Congress and the Commission have long recognized the public interest benefits of public television services and have adopted a policy of ensuring that all citizens have access to public television programming.

In the Public Broadcasting Act of 1967, Congress amended the Communications Act to provide that

"it is necessary and appropriate for the Federal Government to complement, assist and support a national policy that will most effectively make noncommercial educational radio and television service available to all citizens of the United States."<sup>13/</sup>

---

<sup>12/</sup> See, e.g., 47 C.F.R. § 1.1162; Establishment of a Fee Collection Program to Implement the Provisions of the Omnibus Budget Reconciliation Act of 1989, Memorandum Opinion and Order, 5 FCC Rcd 3558, 3573 (1990); Implementation of Section 9 of the Communications Act Assessment and Collection of Regulatory Fees for Fiscal Year 1994, Report and Order, 9 FCC Rcd 5333, 5341 (1994).

<sup>13/</sup> The Public Broadcasting Act of 1967, Pub. L. No. 90-129, 81 Stat. 365 (codified at 47 U.S.C. § 396(a)(7) (1988 & Supp. IV 1992)). 47 U.S.C. 396 (a)(7). Congress has repeatedly reaffirmed its support for access to public service programming in its annual appropriations deliberations and every three years in its reauthorization of funding. Since 1967, Congress has appropriated approximately \$4.925 billion (through FY 1999) to fund public service programming through CPB, and approximately \$702 million (through FY 1997) for the planning and construction of public television and radio facilities, including the public broadcasting satellite distribution system.

More recently, in the Public Telecommunications Act of 1992, Congress added a new paragraph -- Section 396(a)(9) -- to the Communications Act. Section 396(a)(9) provides:

"it is in the public interest for the Federal Government to ensure that all citizens of the United States have access to public telecommunications services through all appropriate available telecommunications distribution technologies . .

<sup>14/</sup>

The legislative history of this statute is also very clear. The House Committee Report states Congress' finding that access to public telecommunications services, through all available distribution technologies, is intended to advance the compelling governmental interest in increasing the amount of educational, informational, and public interest programming available to the public.

This policy of facilitating access for public telecommunications programming has recently been applied to two specific technologies -- cable television and DBS. In the 1992 Cable Act, Congress required cable television systems to carry public television stations, recognizing "a substantial governmental and First Amendment interest in ensuring that cable subscribers have access to local noncommercial educational stations . . . ." Also in the 1992 Cable Act, Congress required that a DBS service provider to reserve between 4 and 7 percent of its channel capacity "exclusively for noncommercial programming of an educational or informational nature."<sup>15/</sup> DBS

---

<sup>14/</sup> Pub. L. No. 102-356, 106 Stat. 949 (Aug. 26, 1992).

<sup>15/</sup> 1992 Cable Act, § 25, 106 Stat. at 1501 (codified at 47 U.S.C. § 335(b)(1) (Supp. IV 1992)). Both provisions have been upheld as constitutional. Turner Broadcasting (continued...)

providers must make this capacity available at preferential rates established by the Commission.

The Commission also has long recognized the unique needs of public telecommunications entities and has adopted policies to ensure public access to such services. In 1952, the Commission reserved 242 channels on the Ultra High Frequency ("UHF") spectrum for educational television.<sup>16/</sup> And more recently, the Commission has affirmed its commitment to the continued vitality of noncommercial television in the digital world. Specifically, in a report and order recently issued in the digital television proceeding, the Commission recognized "the high quality programming service noncommercial stations have provided to American viewers over the years" as well as "the financial difficulties faced by noncommercial stations." Because "noncommercial stations will need and warrant special relief measures to assist them in the transition to DTV," the Commission expressed its intent "to grant such special treatment to noncommercial broadcasters to afford them every opportunity to participate in the transition to digital television."<sup>17/</sup>

---

<sup>15/</sup>(...continued)

System, Inc. v. FCC, 117 S. Ct. 1174 (1997); Time Warner Entertainment Co. v. FCC, 93 F.3d 957 (D.C. Cir. 1996).

<sup>16/</sup> Television Assignments, Sixth Report and Order, 41 F.C.C. 18, 148 (1952).

<sup>17/</sup> Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, MM Docket No. 87-268, Fifth Report and Order (rel. Apr. 21, 1997), ¶ 101.

And with regard to cable, the Commission has concluded that mandatory carriage of public telecommunications programming is necessary to ensure public access.

In its 1990 Cable Report to Congress, the Commission stated:

"Because of the unique service provided by noncommercial television stations, and because of the expressed governmental interest in their viability, we believe that all Americans should have access to them.<sup>18/</sup>

For the Commission now to impose on PBS and public television stations universal service contribution obligations for revenues associated with excess capacity leases -- particularly where commercial entities are exempt from contributions for similar excess capacity leases -- would be fundamentally inconsistent with these past practices. Rather than facilitating public access to noncommercial educational programming, the Commission would be impeding public access. As the Commission has found on numerous occasions, the public interest clearly warrants special exceptions for public television. This situation is no different. To the extent necessary, the public interest warrants waiver of any universal service contribution obligations imposed on public television stations and PBS.<sup>19/</sup>

It will better serve the public if public television stations and PBS are permitted to retain the revenues derived from their excess capacity leases to support their

---

<sup>18/</sup> Competition, Rate Deregulation, and the Commission's Policies Relating to the Provision of Cable Television Services, 5 F.C.C. Rcd. 4962, 5044 (1990).

<sup>19/</sup> It may be more appropriate and more straightforward for the Commission to make a generic exception for the sorts of noncommercial station leases described above. The Commission has used the mechanism of an exception rather than a series of waivers where it intends to grant relief in across-the-board circumstances.

educational services. The contributions to the universal service fund that would be generated by these lease payments would be insignificant. However, for individual stations and PBS, the loss of these funds would be very significant. Further, it is unclear the extent to which PBS or the public television stations could recoup these funds from their lessees. To impose this additional financial obligation on public television stations and PBS, which already are struggling with funding shortfalls, would do more harm than good to the goals of universal access to educational opportunities.

#### **IV. Conclusion**

The goal of the universal service program to bring educational services to all schools and libraries in the United States is also the goal of public television. This goal cannot be served by reducing the funding of public television stations and PBS. APTS and PBS urge the Commission to clarify that Section 54.703 of its rules does not impose contribution obligations on PBS or public television stations for revenues derived from excess capacity lease agreements. In the alternative, if the Commission

concludes that Section 54.703 does impose contribution obligations, APTS and PBS urge the Commission to grant an exception to or waive those obligations.

Respectfully submitted,

PUBLIC BROADCASTING SERVICE

THE ASSOCIATION OF  
AMERICA'S PUBLIC TELEVISION  
STATIONS

By: Paula A. Jameson/acw  
Paula A. Jameson  
Senior Vice President, General Counsel  
and Secretary

Ann Zedd  
Assistant General Counsel

1320 Braddock Place  
Alexandria, VA 22314-1698  
(703) 739-5056

By: Marilyn Mohrman-Gillis/acw  
Marilyn Mohrman-Gillis  
General Counsel  
Lonna Thompson  
Director, Legal Affairs  
1350 Connecticut Avenue, NW  
Suite 200  
Washington, D.C. 20006  
(202) 887-1700

By: Jonathan D. Blake  
Jonathan D. Blake  
Alane C. Weixel  
  
Covington & Burling  
1201 Pennsylvania Avenue, NW  
P.O. Box 7566  
Washington, D.C. 20044-7566  
(202) 662-6000

Their Attorneys

September 3, 1997